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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 28

HERTHA J. SIBBACH, *Petitioner,*

vs.

WILSON & COMPANY, INC., *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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1. The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 415, and also is to be found in the Record, pp. 14-17.

2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1935, 43 Stat. 936, 938. (28 U. S. C. 347a.)

3. Statement of the case and question presented:

The facts are not in dispute.

The sole question presented is as to the validity of an order entered by the United States District Court requiring the plaintiff, in this, a personal injury case, to submit

to a physical examination by a physician appointed by the court.

The order was entered in accordance with Rule 35(a) of the Federal Rules of Civil Procedure. It is attacked on the contention that that rule itself is invalid.

The cause of action sued on in this case arose in the State of Indiana where the accident occurred.

The plaintiff selected as the forum in which to try that right of action the United States District Court located in Chicago, Illinois.

The contention raised by the petitioner (Page 3, Par. 3, Page 4, Par. 4, Pages 15-17) is that the rule under which the court order was entered, abridges or modifies the substantive rights of the petitioner contrary to the Rules Enabling Act. The asserted invalidity is that, there being no *Illinois* statute authorizing the Illinois courts to require a physical examination in such a case, and the Illinois decisions being against that procedure, the plaintiff could not be compelled in the courts of Illinois to submit to such an examination; and that since the law of the State of Illinois is the law of the forum of the Federal District Court and controls that court in this matter, the rule in question could not validly authorize the entry of such an order by any Federal District Court sitting anywhere in Illinois. (Pp. 15, 16 and 17.)

4. As to the reasons advanced by the petitioner for an allowance of writ of certiorari.

The first reason advanced is that the petition presents an important question of Federal law, which has not, but should be settled by this court.

The fact is that the very questions raised in this petition were of necessity passed upon by this court at the time it approved and adopted Rule 35.

The rule in question was presented in the May 1936 preliminary draft of the rules of Civil Procedure prepared by the Advisory Committee of this court and there numbered 39, and the case chiefly here relied on by the petitioner, *Union Pacific R. R. Co.* v. *Botsford,* 141 U. S. 250, was set forth in the footnote to that rule. (See pages 69, 70.)

In the report of the Advisory Committee to this court in April, 1937, the rule in question again appeared as Rule 35, and in the footnote there was again set forth the same case, *Union Pacific R. R. Co.* v. *Botsford,* 141 U. S. 250. Following this report the Advisory Committee made its final report in November, 1937, suggesting changes in various rules, amongst others Rule 35.

In the very full notes published by the Committee thereafter in March, 1938, in addition to the *Botsford* case chiefly relied on, the Committtee cited the subsequent case of *Citizen & Suburban Railway Co.* v. *Stetson,* 177 U. S. 172.

It is also a fact that in January, 1938, the rules were submitted to Congress in accordance with the Enabling Act, and there considered. The Congressional Record in that connection shows the following:

The rules were submitted to both the Senate and the House. (75th Congress, Vol. 83, Part 1, pages 13, 38.)

A joint resolution with reference to a postponement of the consideration of the rules was referred to the Judiciary Committee. (75th Congress, Vol. 83, Part 4, page 4345.)

There was a discussion in the Senate with reference to the question whether or not the rules abridge, enlarge or modify substantive rights. (75th Congress, Vol. 83, Part 8, page 8473.)

The Senate Judiciary Committee made its report and

attached to it a memorandum dealing with substantive law and substantive rights and the question whether or not the rules listed, including Rule 35, violated substantive rights.

A further discussion was had before the Senate as to "discovery" and also Rule 35, during the course of which the *Botsford* and *Camden* cases above referred to, were discussed at length. (75th Congress, Vol. 83, Part 8, pages 8478, 8479, 8481, 8482.)

SUMMARY OF THE ARGUMENT.

The rule providing for a physical examination in a proper case is a valid exercise by this court of the power contained in the Rules Enabling Act.

The rule does not abridge or modify a substantive right.

Matters of procedure in the conduct of trials in the Federal Courts are governed by the Federal statutes. Such statutes may either make their own procedural provisions, or direct that the rules of procedure in force in the State courts be followed (as in the Conformity Act), or delegate to the Federal Courts the power to make rules of procedure (as in the present Rules Enabling Act).

Rule 35(a) deals with a matter that is the proper subject for procedural provisions. And the rule does not extend beyond that realm.

The fact that the matter involved in a rule concerns rights that are of such importance as to require a grant by the legislative body before a court can enter an order with reference to it, does not take the matter out of the realm of procedure and place it in the realm of substantive law. The Rules Enabling Act being a proper delegation of the power to make rules covers the entire field of procedure and is in itself the grant of the power to make any and all rules relating to such matters.

The position of the plaintiff that in this particular matter of procedure the Federal Court sitting in Chicago is, because of that fact, governed by the law of Illinois, is without authority to support it, is in conflict with well settled authority and is untenable.

The law of the forum of the Federal Courts sitting in Illinois is not the law of Illinois but the law of the United States.

ARGUMENT.

I.

The Rule Is Within the Power Prescribed by Congress in the Enabling Act and Does Not Abridge or Modify a Substantive Right.

Rule 35 which provides that where the physical condition of a party is in controversy the court may enter an order specifying the time, place, manner, conditions and scope of an examination to be made and the person to make it, is a valid exercise of the power delegated in the Rules Enabling Act of Congress. (Act of June 19, 1934, Chapter 651; 48 Stat. 1064, U. S. C. Title 28, Par. 723 (b) and (c).)

The rule does not infringe upon the limitation imposed in the Enabling Act, that no rule should abridge, enlarge or modify substantive rights.

The Federal Court, in determining matters of substantive law controlling rights of the parties, is governed by the statute and decisional law of the State in which the cause of action arose.

The decisional statute, so-called Paragraph 34, Federal Judiciary Act of September 24, 1789, 28 U. S. C. 725, so states, and as was said by this court in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 71, that statute is declarative of the rule which would exist in the absence of the statute.

But on the other hand, the Federal Courts, in the conduct of their business, that is, in matters of procedure, are governed by the Federal constitution and statutes.

Hence, when the Act of Congress authorizing this court to make rules of procedure included the limitation that no rule should abridge or enlarge or modify substantive rights, it merely declared the situation as it would exist in the absence of such a limitation.

II.

Congress Properly Delegated to This Court the Power to Makes Rules of Procedure Governing the Federal District Courts.

The right of Congress to prescribe the rules of procedure governing the functioning of the Federal Courts is a right that Congress could properly delegate to the courts, and the limitation against abridging, enlarging or modifying substantive right merely made it clear that the delegation was of the right that Congress had to prescribe rules of procedure.

Chief Justice Marshall at an early date upheld this delegation of power to the courts (1825). *Wayman* v. *Southard,* 10 Wheaton 1.

Mr. Justice Story passed on a similar question in *Beers* v. *Haughton,* 9 Peters 329; 34 U. S. 329, and at page 359 said:

> "The constitutional validity and extent of the power thus given to the Courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this Court in the cases of *Wayman* v. *Southard,* 10 Wheat. Rep. 1, and the *Bank of the United States* v. *Halstead,* 10 Wheat. Rep. 51. It was there held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it from its com-

mencement to its termination, and until the judgment should be satisfied; and that it authorized the Courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered'; and that 'this provision enables the Courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September, 1789.''

See also *Bank of U. S.* v. *Halstead,* 10 Wheaton 22, 27.

The method in which Congress has made use of this power over the last 150 years is indicative itself of the extent of the power and the propriety of its use. We refer to the fact that from the first Congress elected to prescribe the procedure governing the conduct of equity cases by the equity rules and delegated the power to this court to formulate those rules. And the rules were upheld in the cases above cited.

But as to the conduct of the trial of law cases, Congress elected to provide a different procedure and through the Conformity Act (28 U. S. C. A., ¶ 724) to adopt not its own rules but the rules in vogue in the State where the Federal Court might be sitting. And that procedure as adopted in the Conformity Act was upheld by this court in *Beers* v. *Houghton,* 9 Pet. 355.

The Enabling Act of 1934 is but another step whereby Congress again dealt with the power to make rules governing the procedure in law cases and delegated that power to this court.

III.

The Rule Adopted Involves a Procedural Matter.

That the rule in question involves a mere matter of procedure is shown by petitioner's own admission, which is implicit in her argument.

She at no time contends that in this matter of physical examination she is governed by the law in force in the State where the cause of action arose.

It would be practically not possible for the plaintiff to take that position owing to the fact that the cause of action grew out of an accident that occurred in Indiana and is accordingly governed by the Indiana law under the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64. And in the State of Indiana the law is that the court has authority to enter an order directing a physical examination in a personal injury case.

City of South Bend v. *Turner,* 60 N. E. 271, 156 Ind. 418.

Aspy v. *Botkins,* 66 N. E. 462, 160 Ind. 170 (1903).

Kokomo M. & W. etc. Co. v. *Walsh,* 108 N. E. 19, 22 (1915), 58 Ind. App. 182.

Lake Erie & W. R. Co. v. *Griswold,* 125 N. E. 783, 784 (1920), 72 Ind. App. 265.

City of Valparaiso v. *Kinney,* 131 N. E. 237, 238 (1921), 75 Ind. App. 660.

So it was practically not possible for the plaintiff to maintain that the Indiana law applied. And she can not now maintain that the right she insists upon—the right of privacy—is a matter of *substantive law.*

On the other hand if the plaintiff were to maintain that the matter of examination was simply one of procedure,

that position would also be untenable, as procedure in the Federal Courts is governed by the rules of court made pursuant to the Acts of Congress.

Hence, the plaintiff seeks to set up and maintain a middle ground which she describes as the place where the court sits as being the place that governs this particular kind of procedure, which she seems to argue is neither a matter of substantive law nor a matter of procedure, generally speaking.

And from that position of vantage she invokes the Illinois law. In so doing, however, she in effect demonstrates that the matter is one of procedure. The very cases from Illinois cited and the very quotations made show that the orders for physical examinations are regarded as matters of practice and procedure. See *Peoria D. & E. Railroad Co.* v. *Rice*, 144 Ill. 227, 33 N. E. 951, cited on page 13 of the plaintiff's brief, particularly the quotations referring to the matters of rules of practice.

That the rule in question involves a mere matter of procedure is shown by petitioner's own admission, which is implicit in her argument.

In stating the reasons for the allowance of the writ (p. 4) the plaintiff questions the validity of the rule because of the fact that the plaintiff was a litigant "in a Federal Court sitting in Illinois". And in stating the scope of the question presented (p. 15) she again attacks the rule on the ground that it was invoked "in a Federal Court sitting in the State of Illinois where there is no State statute providing for the order and where the State courts hold the order to exceed the court's power"; and that because she has a right in the Illinois courts not to be compelled to submit to a physical examination, she is entitled to have that right enforced in a Federal Court sitting in that State. And again at page

16 where she takes the same position she states that "it may be that rule 35 does not abridge substantive rights of litigants of Federal Courts sitting in States where State statutes * * * permit order for physical examinations." And she repeats the same for States where decisions authorize such a procedure.

It is a truism that the matters coming up before a court in the trial of any lawsuit fall in one or the other of two categories—the matters relating to the substantive right of action, and the matters relating to the procedure in litigating that right of action. The petitioner, as to cases pending in a Federal Court, seeks to add a third category to which she gives no name, but which seems from her argument to depend on the mere geographical location of the Federal Court. And by this argument she seems to assert that while in determining the substantive law controlling the right of action being litigated, the Federal Court must turn to the law of the State where that right of action arose, and while in matters of procedure that Federal Court must be governed by the rules and statutes relating to the Federal Courts, in this third class, *the law of the place where the court sits applies.*

The argument seems to proceed on the theory that there should be included in that classification such items as would ordinarily fall into the category of procedure but which are related to questions of public policy in the State where the Federal Court is sitting (p. 29). In other words, the contention is that if a Federal Court is sitting in a State where the legislation or decisions of that State have declared a public policy, that declaration of public policy must of necessity control the Federal District Court in its procedural matters. No authority is cited for this proposition at all. The Illinois cases cited by counsel at most hold that there is no power in the courts to order a

physical examination short of legislative enactment. They do not declare a public policy against physical examinations in proper cases. But even if they did, there is no authority for the proposition that public policy of the State of Illinois where the Federal Court is sitting should control that Federal Court in a matter of procedure.

Moreover the proposition is repudiated by the very authority chiefly relied upon by her in the petition pending before this court, the *Botsford* case (*Union Pacific* v. *Botsford*, 141 U. S. 250) at page 256:

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States."

The plaintiff also seems to argue that because a legislative act is needed as a basis for an order directing a physical examination, therefore, the rights affected are substantive. We submit that this misconception grows out of the confusion of the rules governing substantive law and procedure on the one hand and the rule of law with reference to orders and rules of court on the other. With reference to the last category, it is, of course, a truism that the mere establishment of a court, by implication places in that court certain powers. It is also a truism that other powers that might be exercised by a court are not implied, and only obtain if they are specifically given. The power to order discovery of books and papers has frequently been held not to be an implied power and that no court can exercise such a power in the absence of a distinct authorization by the legislature to do so. The same is true with reference to the right to order a physical examination. In *Union Pacific R. R. Co.* v. *Botsford*, 141 U. S. 250, so heavily relied upon by the plaintiff, there was *no rule of court, simply an order of*

court, and this court held that the power to enter such an order could not be implied, and could only be justified by an act of the legislature. The later case of this court, *Camden & Suburban R. R. Co.* v. *Stetson,* 177 U. S. 172, holds that where a statute does give such a power to the courts, the power is valid and effective.

But the mere fact that the exercise of such a power needs an act of the legislature for its authority does not mean that the subject matter is a "substantive right."

And when Mr. Justice Gray in the *Union Pacific* v. *Botsford* case, 141 U. S. 250, said at pages 251-252, as quoted by plaintiff at page 30 in her brief, that "no right is held more sacred * * * than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," he could mean only that the exercise of a power directing a physical examination would only be justified when that power had been established by the authority of law. He did not say, and he could not have said, that, therefore, the matter was one of substantive law as contra-distinguished to procedure. The court in that case was not concerned with whether the power was one of procedure or substantive law. It was simply concerned with whether or not the power had been expressly given, and it found that no power had been given. And the same is true in the *Camden & Suburban R. R. Co.* v. *Stetson* case, 177 U. S. 172, where the question again was whether such a power had been expressly given, and the court held it had been.

Again this court in the *Stetson* case was not concerned with drawing a distinction between substantive law and procedural law. Such a distinction was immaterial in that case. For since it involved a cause of action which arose in the same State where the trial court was sitting, and

since under the Federal statutes existing at that time the substantive right of action was governed by the law of that State as well as the procedure in the Federal Court, a distinction between the two would be of no moment. Such a distinction only becomes important where the procedural law is determined by the Federal statutes or rules and the substantive law is determined by the law of a State where the cause of action arose.

The opinion by Mr. Justice Holmes, *Stack* v. *N. Y. etc. Railroad*, 177 Mass. 155, 58 N. E. 686, quoted from so extensively by petitioner at page 33 clearly makes the same distinction.

IV.

The Plaintiff's Position Is Untenable That the Federal Court Sitting in Chicago, Illinois, Is Controlled in Its Procedural Matters by the Law of the State of Illinois.

The petitioner in seeking to avoid the dilemma as between the substantive law of Indiana and the procedural law governing the Federal Courts refers to the *law* of *the forum* where she says (p. 17): "Is it incumbent on a Federal Court sitting in Illinois to follow this Indiana Rule? Plaintiff contends that it is not, that the law of Illinois—the *law of the forum*—governs. Point IV, Pages 51-54 of this brief, contains the argument on this point." And on page 52, the plaintiff urges that "an order for a physical examination is governed *by the law of the forum.* • • • Certainly it is a matter of procedure within the rule that the law of *the forum* governs procedure." And on page 53, *"The law of the forum that the Federal Court applies is the law of the State where the court sits—in this case, Illinois."* (Italics ours.)

We submit that this position stands on an entire mis-

conception of "forum." The *lex fori*, or law of the forum, in the case of a Federal Court is the law of the United States. The United States is the forum of the Federal Court. No authority is cited for the proposition that the place where the court is sitting, that is, the State in which the Federal Court happens to sit, is the forum of that court. The Federal Courts are the creatures of the Federal Government—the constitution and Acts of Congress. The constitution and the Acts of Congress give the court its jurisdiction and the law governing it in performing its procedural functions. The State in which the court is sitting has to do with procedure only so far as the Federal statutes have clearly so provided, as was done in the Conformity Act, and as was done in one of the present Rules of Civil Procedure, the Evidence Rule No. 43.

See Bouvier's Law Dictionary—Forum.
See Bouvier's Law Dictionary—Lex Fori.

We submit that in the absence of a Federal statute so providing, there is no authority or logic to support this conception of the plaintiff that a Federal Court is bound by the law of the State where that Court geographically happens to be located.

V.

The Rule Requiring the Submission to a Physical Examination Is Not Violative of a Substantive Right.

We submit that the limitation in the Enabling Act in making use of the term substantive right uses it interchangeably with substantive law, and that it was not meant to include those numerous substantial rights which any individual may have, and which must be protected on the one hand, but on the other hand, of necessity, become affected by the course of the proceedings and practice in

the trials of a lawsuit. The most perfect example that we have of such substantive rights is found in the field of discovery. There is no right more jealously protected by the courts than that which protects its citizens against search or seizure. Yet the decisions of the courts have sustained statutes *and general rules* providing for discovery of facts that may be disclosed by books and records of parties litigant, in advance of trial.

See *Sinclair Refining Co.* v. *Jenkins Petroleum Co.*, 289 U. S. 789, and *Wilson* v. *U. S.*, 221 U. S. 361.

For a general discussion of the subject of substantive rights in connection with Rules of Civil Procedure, we refer also to American Bar Association Journal, Vol. 21, July 1935, 406, particularly the following paragraphs:

> "This was the interpretation put upon the grant of rule-making power under the English Judicature and County Courts Acts. In *Poyser* v. *Minors* (1881), 7 Q. B. Div. 329, the Court of Appeals, speaking by Lush, L. J., said:
>
> " 'Practice', in its larger sense—the sense in which it was obviously used in that (the County Courts) Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines that right, and which by means of the proceeding the Court is to administer,—the machinery as distinguished from its product.'
>
> "If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including mesne and final process and every type of auxiliary remedy, but they should not deal in any way with the character of the rights which are to be determined by the final judgment."

See also *Pusey & Jones Co.* v. *Henson*, 261 U. S. 491, where this court held that a statute of Delaware giving the

right to a creditor whose debt had not been paid to have a receiver appointed by the Chancery Court was not a substantive right, but a mere procedural provision, which had no effect in the Federal Courts, in view of the fact that the Federal Court procedure in equity is governed by the equity rules and not the State practice.

See also:

Washington Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635.

Substance and Procedure, Conflict of Laws, Walter Wheeler Cook, 42 Yale Law Review 333; January 1933.

VI.

As to the Observations of the Plaintiff with Reference to the Effect of This Rule.

The plaintiff, pursuing her argument that the right of privacy is an important and substantial right, contends that Rule 35 is solely for the benefit of defendants and not plaintiffs, and, in fact, discriminates against plaintiffs (p. 43). We submit that there is not only no discrimination but that the rule is reciprocal. Of course, in view of the fact that without an act of the legislature given directly or through authorized rules of court a plaintiff in a personal injury case can hide behind an assertion of modesty and privacy and refuse to permit an examination which would prove or disprove a claimed injury, an act of the legislature or rule of court requiring such an examination is merely corrective of an equalization of the position of the parties. There is no discrimination.

In fact, such a rule works both ways. For while it is, of course, true that an examining physician appointed by the court by that very fact acquires a standing before a jury, and his testimony against the plaintiff (as counsel for

the plaintiff assume it will be), will be most telling, it is also true that his testimony would be against the defendant if the facts were as claimed by the plaintiff, and in that case the plaintiff would be at a decided advantage and the defendant at a decided disadvantage. Conceded that the ultimate objective of a trial, irrespective of the parties' attitude, is the truth, this rule aims to accomplish that purpose, whomever the truth may hurt.

Conclusion.

We submit that the decision of the Circuit Court of Appeals was correct and the Petition for Certiorari to review it should be denied.

Respectfully submitted,

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